LIBERTY VERSUS EQUALITY - FREEDOM OF EXPRESSION - A GAY PERSPECTIVE

1. INTRODUCTION

They usually call themselves 'civil libertarians' and they usually defend 'freedom of expression' in all circumstances and against all comers as the fundamental cornorstone of individual freedom. But the force of their arguments is today being swept aside by the demands of minority groups in society that 'expressions' of bias and distain by the majority about minorities be excised from social discourse. This movement was launched by blacks and jews, and has recently been carried forward by feminists with great effect for the cause women's equality. In the language of the political philosophers they are saying that the demand for equality must supercede and modify our traditional notion of freedom of expression. The logic, or illogic, of these positions recurs right across the horozon of social affairs from explicit 'expression' about sexual matters in the pornography debate to the management of school yard speech and classroom curriculum.

Lesbians and gays are but one minority among many. They have traditionally made camp with, and aped the arguments of, the civil libertarians in these debates. There we found the most tolerant elements of a society that despises us. But the sands have shifted. We must ask whether a new position is possible or desirable. As a minority particularly concerned with sexual matters the machinations of the pornography debate are of central, but by no means the exclusive, concern. Has the emerging concern for equality assisted us in the realm of freedom for sexual expression? My evaluation is that it has not. How does this fact affect the position we take on issues regarding the regulation of expression in other areas from hate propaganda to workplace harassment?

IDEAS

THE MARKETPLACE OF FREE EXPRESSION

The main, but not the only, civil libertarian argument for the supremacy of 'free expression' over equality and all other values is that in the free market place of ideas the truth will out.

"Let [truth] and falsehood grapple; who ever

knew truth put to the worse in a free and open encounter."

Milton - Aereopagitica

Mills - On Liberty - "marketplace of ideas"

- all can participate in the forming of opinion - none can dictate what truth is

- in this way "the truth" will emerge

This rationale is not persuasive to me. The "truth" is much more ephemeral. The "truth" like history is rewritten by each generation. The "truth" is class based concept. Two centuries of so-called freedom of expression oppression have done little until very recently to relieve our society of the religious and sexual delusions that distort our lives and politics and block the path to happiness and enlightenment - in my opinion.

McKinnon rightly complains that analysis of "free speech" does not pay adequate attention to the issues of equality.

equal access to the media makes a mockery of "freedom of expression" - I believe the dicta of Warhol that each will have five minutes of fame. This is the phoney democracy of the global village. But real power lies with those who chose when you get your five minutes, and who does the colour casting.

- All this can be derived from defamation law.

The liberal position that freedom of expression is the sine qua non of democracy and the true guarantee of equality of citizens is the theory held by those who already hold, or aspire to, the commanding positions in media and universities, and other social institutions.

But admitting this doesn't tell us much about what to do in a non-revolutionary situation. What do we do today to make things better, and be sure they don't get worse?

Another and better civil libertarian argument against the regualtion of expression is the problem of picking the censor. This is discussed below.

INEQUALITY OVERRULES FREE EXPRESSION

Catherine McKinnon has put forward a number of arguments against "free speech" - or perhaps more precisely the primacy of the First Amendment in U.S. constitutional law - most

FN 1

recently in her book Only Words. Her most prominent and articulate opponent is the great liberal Ronald Dworkin. You can read the nuances of these arguments for yourself. We're concerned here with the position we should take in this debate, or perhaps more modestly, how these arguments might affect our position on freedom of expression issues.

The Porn Debate

As I understand it the debate between McKinnon and Ronald Dworkin about free speech and equality it can be summarized as follows. The disagreement is most sharply drawn regarding sexually expression. Pornography is the term most commonly used to describe description and depiction of explicit sex, although libertarians dislike conceding that non-violent sexually explicit material they call erotic should be labelled porn. To many gays 'porn' is a dear of endearment, an affectionate send-up. We will return to the relationship between sexual and non- sexual speech in due course.

To this summary I add my comments about analogous circumstances and reactions as might affect lesbians and gays.

(1) Porn "Recreates" Women as Sex Objects and makes them unequal participants in the Marketplace of Ideas

- recreated in the form of male fantasy

- "...pornography ... conditions men to misunderstand what they say."

- Ronald Dworkin denies this factually

-"strikingly implausible"

NYR - Aug 15, 91, p.14

- R.D. mostly correct - this phenomena only a remote influence in political discourse - greater impact in social sphere

- R.D. also says theory is incorrect

...the right to free speech does not include a right to circumstances that encourage one to speak, and a right that others grasp and respect what means to say."

NYR - Oct. 21, 1993

- QUOTE BUTLER

- if restated as women's unequal access to the media the point has validity - but then what has it got to do with porn except very very remotely

It seems to me that lesbian and gay "porn" "recreates" us in a positive way. What was once shameful and secret is now open and available. Our porn looks like - sort of - your porn. We can see what you do. Our sex lives are as valid as yours. I don't want to overstate the case, but it would seem that "gay porn" especially has played a positive role in the liberation of gay men.

From another point of view homophobic jokes, jibes, taunts and other hostile references create or maintain the historic distrust andcontempt for homosexuals. Most references to same sex orientation are 'framed' in a negative way. Even expressions of tolerance are often framed by expressions of abhorance and contempt. Judge Hawkins says:

(2) Pornography humiliates and frightens women into silence

- seems implausible in the last few years

- maybe true for the non-vocal majority, and in social, family setting

- same critique as above

- QUOTE <u>BUTLER</u>

Lesbians and Gays certainly have been humiliated by heterosexist propaganda. Certainly for a century they were frightened into silence. It's my impression that the instrument of this has not been explicit images of hetero sex, but rather the hegemony of patriarchal notions of the right and proper role of men and women in the work place and at home. Obviously in the last twenty years of "gay liberation" and open closets, this has been less of a problem. It also seems that the widespread availability of explicit images and stories about lesbian and gay sex, porn if you like, has been a principle means of freeing lesbians and gays from the humiliation and fear they may have felt by normalizing their sex lives. Whether that is also true of s/m porn is another question.

"Hostile Environment" Theory - The Equality Argument

- porn contributes to the general subordination of women - depicts them as sexual and servile objects

- eliminating porn serves equality of opportunity

- articulated in Butler - get Quote

- different from "silencing argument" in that only certain groups - disadvantaged victim groups - can have the benefit

- porn is hate propaganda

    - SCC upheld hate propaganda in Keegstra

        - British Race Relations Act forbids speech of racial hatred, not only when it is likely to lead to violence, but generally on the grounds that members of minorities should be protected from racial insults

- Ronald Dworkin's position

        - you can't have political democracy if everyone doesn't have at least the opportunity to participate in the great political and social debate - liberty is the guarantor of equality

        - don't want to give to the state the authority to ban words and images that might tend to subordinate certain disadvantages groups in society. This power will in the end be used to enforce majority attitudes, and to stamp out minority views.

        - certain limited circumstances this may be permissible - no sexual harassment at work - BUT not generally in society

- this is the liberal response which I criticized earlier. It is insensitive to the position of minorities. It speaks from the position of power. It fails to respond when minorities challenge the nut and bolts, the glue, the language and ideas of discrimination and oppression.

- Is Dworkin right that we can only defend minority rights by deferring to the status quo of elite control of public opinion? He obviously wouldn't agree to the way I frame the question.

- Dworkin makes and interesting admission that some limited forms of speech control might be acceptable.

> How could he do otherwise? On a small scale, in the workplace, it becomes painfully obvious how words are so often indistinguishable from sexist deeds. This small concession from paladin of the powerful, this gesture of conscience, this small crack - is one through which a mighty wind has started to blow, and it will change the landscape of "free expression".

Lesbians and gays certainly suffer from a hostile environment. It has the same roots, blind and arrogant patriarchy, of which women complain. If heterosexist pornography creates, conditions and reinforces male violence and patriarchy then it affects us. But no form of thought control is justified if based this kind of obtuse casual connection.

If anything lesbians and gays are adversely affected by the inflammatory effect on the ignorant and already intolerant of the availability of same sex porn which serves as a trigger for contempt.

Are we tempted by the possibility of criminalizing or otherwise banning homophobic hate propaganda? It is evident that at least some in our community think this is the way to go. A recurring issue, for example, is whether sexual orientation should be added to the hate propaganda provisions of the Criminal Code. Certainly there is some material out there that contributes to our subordination. But it seems that material has little to do with explicit sexual material. If we are tempted to adopt the feminist logic on this topic our targets will different than theirs.

> Porn IS Violence
>
> - McKinnon says women seeing porn, or knowing some male is watching it in secret, is suffering the offence of rape committed there
>
> - I believe Dworkin right to translate this to mean "the material is OFFENSIVE" - it is upset because of what it symbolizes
>
> - this is like the politics of flag desecration - akin to historical retribution - the sins of the fathers passed on to the sons
>
> - this is really just another argument that porn humiliates

THE DEPTH AND BREADTH OF REGULATED SPEECH

WHO WILL PICK THE CENSOR

EQUALITY IN PORN

HUMAN RIGHTS COMMISSION AS A FORUM

****

(i) QUOTES - from Butler

T5 - p31 - reinforce stereotypes

"The clear and unquestionable danger of this type of material is that it reinforces some unhealthy tendencies in Canadian society. The effect of this type of material is to reinforce male-female stereotypes to the detriment of both sexes. It attempts to make degradation, humiliation, victimization, and violence in human relationships appear normal and acceptable. A society which holds that egalitarianism, non-violence, consensualism, and lity are basic to any human interaction, whether sexual or other, is clearly justified in controlling and prohibiting any medium of depiction, description or advocacy which violates these principles".

- p33

- p36 - humiliated

"The message of obscenity which degrades and dehumanizes is analogous to that of hate propaganda. As the Attorney-General of Ontario has argued in its factum, obscenity wields the power to wreak social damage in that a

significant portion of the population is humiliated by its gross misrepresentations."

(ii) - US articles

(iii)- LEAF's rational

- dealt with below

(3) explicit/degrading/violent

- QUOTE Butler p24

"Pornography can be usefully divided into three categories: (1) explicit sex with violence, (2) explicit sex without violence but which subjects people to treatment that is degrading or dehumanizing, and (3) explicit sex without violence that is neither degrading nor dehumanizing."

(4) what is "degrading"

- Butler says: p20

"Among other things, degrading or dehumanizing materials place women (and sometimes men) in positions of subordination, servile submission or humiliation. They run against the principles of equality and dignity of all human beings."

"... there is a range of opinion as to what is degrading and dehumanizing. ... Because this is not a matter that is susceptible of proof in the traditional way and because we do not wish to leave it to the individual tastes of judges, we must have a norm that will serve as an arbiter in determining what amounts to an undue exploitation of sex. That arbiter is the community as a whole".

p24

- consent is degrading

p20

"In the appreciation of whether material is degrading or dehumanizing, the appearance of

consent is not necessarily determinative. Consent cannot save materials that otherwise contain degrading or dehumanizing scenes. Sometimes the very appearance of consent makes the depicted acts even more degrading or dehumanizing."

p24

- General Comments -

- the right has appropriated the language

- Crown says "explicit sex outside the context of a long term loving relationship" is 'degrading'

"The courts must determine as best they can what the community would tolerate others being exposed to on the basis of the degree of harm that may flow from such exposure. Harm in this context means that it predisposes persons to act in an anti-social manner as, for example, the physical or mental mistreatment of women by men, or, what is perhaps debatable, the reverse."

- McKinnon theories of reinforcement of inequality of women generally

MORE BUTLER QUOTES
p31, 33, 36

"The clear and unquestionable danger of this type of material is that it reinforces some unhealthy tendencies in Canadian society. <u>The effect of this type of material is to reinforce male-female stereotypes to the detriment of both sexes. It attempts to make degradation, humiliation, victimization, and violence in human relationships appear normal and acceptable</u>. A society which holds that egalitarianism, consensualism, and mutuality are basic to any human interaction, whether sexual or otherwise, is clearly justified in controlling and prohibiting any medium of depiction, description or advocacy which violates these principles". - P. 31

"In the words of Nemetz, C.J.B.C. in R. v. Red Hot Video Ltd. ... there is a growing concern that the exploitation of women and children, depicted in publications and films can, in certain circumstances, lead to "abject and servile victimization." - P. 33

"The message of obscenity which degrades and dehumanizes is analogous to that of hate propaganda. As the Attorney-General of Ontario has argued in its factum, obscenity wields the power to wreak social damage in that a significant portion of the population is humiliated by its gross misrepresentations." - P. 34

The hardcore and violent porn convinces violence prone men that violence is part of the normal male-female sexual relations, that women desire and enjoy rape, and that rape is only the exuberance of an oversexed man. The soft core erotica convinces non-violent men that women (and often children too) are inanimate toys for men to play with and use to their own satisfaction. That's the way women's body's are presented in the men's entertainment magazines.

Phylis Schlafly

Sooner or later in one way or another the consumers want to live out the pornography in three dimension. Sooner or later, in one way or another, they do. It makes them want to; when they believe they can, when they feel they can get away with it, they do.

C. McKinnon,
Only Words

- QUOTE - T5 p21 -

"While the accuracy of this perception not susceptible to exact proof, there is a substantial body of opinion that holds that the portrayal of persons being subjected to degrading or dehumanizing sexual treatment results in harm, particularly to women and therefore to society as a whole."

p25 -

"The stronger the inference of a risk of harm the lesser the likelihood of tolerance. The inference may be drawn

from the material itself or from the material and other evidence."

"While a direct link between obscenity and harm to society may be difficult, if not impossible, to establish, it is reasonable to presume that exposure to images bears a causal relationship to changes in attitudes and beliefs." - P. 36 -- CMC CHECK THIS ONE

p37

- Rawkins

p30 - "substantial risk of societal harm...is now an essential element...The latter finding must be specific to the individual case and must be made in the context of the evidence adduced at trial and by the application of the accepted criminal law standard of proof to that evidence."

and p31...

BUT Butler says "inference may be drawn from material itself"

Remember the LEAF theory of causation.

"...some of the subject pornography of men for men, in addition to abusing some men that is more common to abuse women through sex, arguably contributes to abuse and homophobia as it normalizes sexual aggression generally."